



# City of Canby

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## MEMORANDUM

**DATE:** July 20, 2021 for July 28, 2021 City Council Meeting

**TO:** Mayor and City Council

**FROM:** Erik Forsell, AICP – Associate Planner

**RE:** **Item # 1** – Consideration of a proposed Comprehensive Plan Map Amendment and Concurrent Zone Change. The proposal is amend the Comprehensive Plan Map for the subject property from Low-Density Residential (LDR) to Medium Density Residential (MDR) and concurrently rezone the property from Low-Density Residential (R-1) to Medium-Density Residential (R-1.5)

**Item # 2** – Appeal of Planning Commission denial of a Subdivision Application for a 20-unit subdivision.

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### Executive Summary

Staff recommend that the City Council approve Comprehensive Plan amendment and Zone Change (City File # CPA/ZC 21-01) and overturn the Planning Commission's denial of the residential subdivision (City File # SUB 21-02 / APP 21-02). These projects are parts of the *Hemmerling Development Proposal*. The body of this report discusses:

- Background of these land use requests and their interrelatedness
- Planning Commission's findings and reasoning
- The review criteria for a Type III appeal and a Type IV decision by Council,
- Staff recommendation
- Options for City Council

The *Hemmerling* development proposal was originally submitted as four separate applications combined into one proposal, which are requests for: Comprehensive Plan Map amendment, zone change, subdivision and a major variance. The subdivision proposal is reliant on the approval of the Comprehensive Plan Map amendment and zone change – the subdivision preliminary plan proposes four more lots, an increase from 15 to 19 individual lots (originally 20 lots) as a result of a change from low density to medium density residential. Staff recommended denial of the variance request and it was denied by the Planning Commission. That portion of the proposal is no longer part of the overall request by the applicant. **Figure 1** on the following page describes the different land use applications, the decision type, and status.

**Figure 1 – Hemmerling Project Land Use Applications**

Land Use Action	Decision Type	Status of Application
Comprehensive Plan Map Amendment	Type IV	Planning Commission recommended denial; City Council decision required.
Zone Change	Type IV	Planning Commission recommended denial; City Council decision required.
Subdivision	Type III	Planning Commission denied; appealed by the applicant to City Council.
Variance	Type III	Planning Commission denied; no further action.

The nature of this application is somewhat complicated as there are Type III and Type IV land use applications which are part of the overall project. The subdivision, as proposed, is reliant on the Comprehensive Plan Map amendment and concurrent zone change gaining approval. This process which was established prior to current staff's involvement allowed for these applications to be processed concurrently. This is a practice that the Planning Department will no longer allow unless procedural code revisions allow for better management of a mixed Type III/IV process.

The Comprehensive Plan Map amendment and Zone Change (City Files CPA/ZC 21-01) are Type IV applications and therefore must be considered by the City Council after receiving a recommendation from Planning Commission.

The subdivision is a Type III application and a final decision was made by the Planning Commission. The subdivision (City File 21-02) was denied by the Planning Commission and the applicant appealed that decision to the City Council (APP 21-02). The appeal of a Planning Commission denial is forwarded on to the City Council for consideration.

As of July 28, 2021, the subdivision and zone change which are subject to ORS 227.178 are 120 days into the 120 day timeline for action by the City. Staff recommend that Council make a decision at this hearing date so that the 120-day timelines are not exhausted.

**Item # 1 – Consideration of a proposed Comprehensive Plan Map Amendment and Concurrent Zone Change. The proposal is amend the Comprehensive Plan Map for the subject property from Low-Density Residential (LDR) to Medium Density Residential (MDR) and to concurrently rezone the property from Low-Density Residential (R-1) to Medium-Density Residential (R-1.5)**

**Background**

Staff recommended approval of the project subject to conditions of approval. The Canby Planning Commission voted 4-1 to forward a recommendation of denial to the City Council at their June 10, 2021 meeting. This portion of the project is a Type IV land use process which requires a final decision to be made by City Council. The file numbers for this portion of the project are CPA/ZC 21-01. The appropriately noticed meeting on May 10, 2021 included a public hearing and presentation by planning staff who summarized the staff report dated May 3, 2021 (**Attachment E**).

The minutes of the May 10, 2021 meeting were approved by the Planning Commission on May 24, 2021 and are included with this memorandum (**Attachment C**).

There were five principal findings made by the Planning Commission as part of the final order **(Attachment D)**. Of the five, one finding is directly applicable to the Comprehensive Plan Map amendment and Zone Change.

1. The approved N. Holly Development Concept Plan zoning of R-1 is inconsistent with the proposed zoning of R-1.5.

### **City Council Proceedings in a Type IV Decision Process**

Canby Municipal Code Chapter 16.89.060(F) prescribes the manner in which the City Council shall consider a Type IV land use application.

1. Upon receipt of the record of the Planning Commission proceedings, and the recommendation of the Commission, the City Council shall conduct a review of that record and shall vote to approve, approve with conditions, or deny the recommendation of the Planning Commission.
2. The City Council may question those individuals who were a party to the public hearing conducted by the Planning Commission if the Commission's record appears to be lacking sufficient information to allow for a decision by the Council. The Council shall hear arguments based solely on the record of the Commission.
3. The City Council may choose to conduct public hearings on Comprehensive Plan amendments, amendments to the text of this title, zone map amendments, and annexations. If the Council elects to conduct such hearings, it may do so in joint session with the Planning Commission or after receiving the written record of the Commission. (Ord. 1080, 2001)

### **Code Analysis and Discussion**

Pursuant to 16.89.060(F)(1), *Upon receipt of the record of the Planning Commission proceedings, and the recommendation of the Commission, the City Council shall conduct a review of that record and shall vote to approve, approve with conditions, or deny the recommendation of the Planning Commission.*

**Staff Discussion:** Staff have included the entire record as attachments to this memorandum for review by the City Council. The Planning Commission voted 4/1 to forward a recommendation to the City Council to deny Comprehensive Plan Map amendment and Zone Change City (File # CPA/ZC 21-01).

Staff understand from the Planning Commission's final findings, minutes and motion that the recommendation of denial was made primarily on the basis of a change to a previously approved N. Holly Development Concept Plan. The approval criteria for a Comprehensive Plan Map amendment and zone change are found below:

#### *16.88.180 Comprehensive Plan Amendments*

*D. Quasi-judicial Plan Amendment Standards and Criteria. In judging whether a quasi-judicial plan amendment shall be approved, the Planning Commission and City Council shall consider:*

- 1. The remainder of the Comprehensive Plan of the city, as well as the plans and policies of the county, state, or any local school or service districts which may be affected by the amendments;*
- 2. Whether all required public facilities and services exist, or will be provided concurrent with the anticipated development of the area.*

*E. For proposed comprehensive plan amendments, which must consider the long-term adequacy of the transportation system for TPR 660-10-060 compliance, ODOT must be consulted to determine whether a highway project is “reasonably likely to be funded” based on funding projections at that time. (Ord. 740 section 10.8.80, 1984; Ord. 981 section 16, 1997; Ord. 1080, 2001; Ord. 1340, 2011; Ord. 1514, 2019)*

*16.54.040 Standards and criteria. In judging whether or not the zoning map should be amended or changed, the Planning Commission and City Council shall consider the following criteria:*

*A. The Comprehensive Plan of the city, giving special attention to Policy 6 of the land use element and implementation measures therefore, and the plans and policies of the county, state and local districts in order to preserve functions and local aspects of land conservation and development;*

*B. Whether all required public facilities and services exist or will be provided concurrent with development to adequately meet the needs of any use or development which would be permitted by the new zoning designation. (Ord. 749 section 1(B), 1984; Ord. 740 section 10.3.85(D), 1984; Ord. 1514, 2019)*

**Staff Discussion:** Staff believe that the Planning Commission erred in recommending denial of this Comprehensive Plan Map amendment for the following reasons:

- The findings for denial were not based on the Comprehensive Plan itself and no indication was provided that demonstrates the proposed change would have a deleterious effect on other plans and policies of the county, state or any local school or service districts. While it is true that this change will modify a small portion of the N. Holly Development Concept Plan (DCP), staff believe that DCPs can be modified post annexation approval – they are not justifications for binding and absolutely permanent comprehensive plan and zoning designations.

This could be problematic for future land use planning if it were found that after a Development Concept Plan is adopted, that future changes would not be permitted. Staff does not find that there is any rational basis in code or state law that would back up the assertion that a DCP is a permanent place holder for a Comprehensive Plan designation and zoning district. Additionally, there have been other similar hearing approvals permitting changes in residential comprehensive

plan designations.

- The Planning Commission did not find that the proposed Comprehensive Plan amendment or zone change would create a situation where a property would lack the provision of public facilities and infrastructure to serve the subject property. In fact, the existing road facilities are conditioned to be approved to a higher standard and include improvements to sidewalks and pedestrian infrastructure as part of the overall project.
- A Transportation Planning Rule (TPR) analysis and memorandum was provided by the applicant and reviewed by DKS, the city's traffic consulting engineer firm. The analysis found that the proposed map amendment and zone change are consistent with the Oregon Administrative Rules.

For these reasons, staff believe that the Planning Commission erred in recommending denial. Staff maintain the original recommendation of approval as stated in the staff report and Planning Commission public hearing. Staff finds that the Comprehensive Plan Map amendment and zone change substantially meet the approval criteria and should be approved subject to the conditions of approval stated in the original staff report (**Attachment E**).

*Pursuant to 16.89.060(F)(2), The City Council may question those individuals who were a party to the public hearing conducted by the Planning Commission if the Commission's record appears to be lacking sufficient information to allow for a decision by the Council. The Council shall hear arguments based solely on the record of the Commission.*

**Staff Discussion:** The City Council will review the record from the May 10, 2021 Planning Commission public hearing and can question any party that was part of the Planning Commission public hearing for additional information if needed.

*Pursuant to 16.89.060(F)(3), The City Council may choose to conduct public hearings on Comprehensive Plan amendments, amendments to the text of this title, zone map amendments, and annexations. If the Council elects to conduct such hearings, it may do so in joint session with the Planning Commission or after receiving the written record of the Commission. (Ord. 1080, 2001)*

**Staff Discussion:** The City Council may choose to conduct a public hearing on the Comprehensive Plan amendment and zone map change and if desirable do so with the Planning Commission present.

### **Staff Recommendation**

Staff maintain the original recommendation of approval as stated in the staff report and Planning Commission public hearing. Staff finds that the Comprehensive Plan Map amendment and zone change substantially meet the approval criteria and should be approved subject to the conditions of approval stated in the original staff report.

### **Council Action**

The Planning Commission forwarded a recommended of denial to the City Council for the Hemmerling Comprehensive Plan Map amendment and zone change (City File # CPA/ZC 21-01).

There are two possible actions that the City Council may take in regards to the final decision on Hemmerling Comprehensive Plan Map amendment and zone change (City File # CPA/ZC 21-01).

1. Move to deny the request and affirm the Planning Commission's final written findings.
2. Move to approve the request and adopt the original conditions of approval as stated in the staff report and make a finding that based on the original staff report, testimony, and findings included in the City Council packet that the City Council finds the Comprehensive Plan Map amendment and zone change substantially meet all applicable criteria.

Sample language: *"I move to approve Option \_\_ as indicated in the Council Staff Memorandum dated May 21, 2021."*



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## **Item # 2 – Appeal of Planning Commission denial of a Subdivision Application for a 20-unit subdivision.**

### **Background**

As mentioned previously in this memorandum, the Hemmerling Project contains four individual applications which together form the land use proposal – This portion of the memorandum discusses the Subdivision (City File # SUB 21-02) and the subsequent appeal of that decision (City File # APP 21-02).

After concluding the public hearing at the May 10, 2021 meeting, the Planning Commission voted 5-0 to deny the request for a subdivision.

The applicant appealed that decision within the 10-day timeline for action and paid the appropriate appeal fees.

Of special note regarding this application are the following for the City Council to consider:

- The applicant requested several times to keep the record open in order to allow the applicant to submit additional information, the Planning Commission did not grant that request.
- The applicant was given the opportunity to have this item heard again at Planning Commission again but instead preferred to be heard at City Council. The applicant cited concerns about the Planning Commission's ability to render an impartial decision.
- Pursuant to ORS 227.178, the subdivision application is 99 days into the 120-day rule on timelines for action. Absent a decision at this hearing, the City will be out of compliance with the timeline for action standards. Applications not in compliance with ORS 227.178 are subject to possible writs of mandamus.
- These individual land use applications are bound together and the subdivision is reliant on the Comprehensive Plan Amendment and Zone Change gaining approval.

### **Planning Commission's Decision and Final Findings**

As mentioned previously in this report, the Planning Commission voted 5/0 to deny the subdivision application. The Planning Commission's findings and reasoning for denying the application are listed below. The entire Final Order is included as **(Attachment D)**.

- That the proposed lots created through this process would not have the same character, access or parking as other R-1.5 lots, specifically the subdivided properties to the east.
- That the proposed lot placement and relation with the alley was problematic.

- Setbacks, traffic and parking appeared to be inconsistent with the applicable standards.
- The variance was in connection with the upzone and did not sufficiently demonstrate compliance with the criteria.

### **Appellant's Statement**

- The Planning Commission did not interpret the subdivision requirements correctly because:
  - The Applicant demonstrated that the subdivision proposal is meeting or can meet all of the subdivision requirements as outlined in Section 16.62 and 16.64 of the City's code. The lots meet the minimum requirements and have a similar character in terms of lot size, access, and parking as lots to the east and southeast that are zoned R1.5.
  - Alleys are permitted within new residential subdivisions in accordance with Section 16.64.010.K. under the City's code. Alley design and access from the alleyway to North Locust Street meets the City's code meets the Canby Public Works Design Standards. Similarly, traffic, vision clearance and off-street parking are all consistent with the requirements of the City's code.
- The Applicant does not believe the Planning Commission considered all of the information that was pertinent to the case. This was primarily due to the fact the Planning Commission ignored the Applicant's repeated requests at the hearing to: 1) keep the record open in order to allow the Applicant to collect additional information and submit new data and/or 2) have the public hearing continued to a date specific (i.e., May 24, 2021). In both cases, the Planning Commission disregarded the Applicants request to provide additional relevant evidence and/or testimony afforded to the Applicant in accordance with Section 16.89.050.E.6 of the City's code.
- Had the record been kept open as requested, the Applicant was prepared to address the concerns raised by Planning Commission at the hearing as follows: 1) to eliminate lot 17, and 2) to withdraw the variance request commensurate with Staff's recommendation that the variance be denied. These two actions are directly related. Proposed lot 17 was a very shallow, corner lot that, without the variance, lacked the depth needed to accommodate a home with an interior livable area and usable rear yard similar to other homes in the development.
- The variances requested were an attempt to remedy these shortcomings. Reducing some of the interior side yard setbacks of the lots 18-20 and the rear yard setback of lot 18 allowed additional area on lot 17 within which to site a more conventional house plan. Ultimately, neither Staff nor the Planning Commission viewed this proposal favorably. Our choices at that point were to either 1) build a functionally substandard home or 2) to eliminate the lot. Our preference was the latter. However, we did not have an opportunity to make this proposal once the Planning Commission disregarded our request to leave the record open.

### **Appeal Review Criteria**

*16.89.050(I) Appeal. The Planning Commission's decision on a Type III decision or Type II appeal may be appealed to the City Council as follows:*



*1. The following have legal standing to appeal:*

- a. The applicant;*
- b. Any person who was mailed notice of the decision;*
- c. Any other person who participated in the proceeding by testifying or submitting written comments; and*
- d. The City Council, on its own motion.*

**Staff Discussion:** The applicant appealed the decision and has the appropriate standing to do so.

*2. Procedure.*

*a. A Notice of Appeal shall be filed in writing, on forms provided for the purpose by the Planning Director, within 10 days of the date the Notice of Decision was mailed.*

*b. The Notice of Appeal shall be accompanied by all required information and fees.*

**Staff Discussion:** The notice of appeal was submitted according to the required criteria.

*c. The appeal shall be limited to the specific issues raised during the comment period and public hearing process unless the hearings body allows additional evidence or testimony concerning any other relevant issue. The hearings body may allow additional evidence if it determines that such evidence is necessary to resolve the case. The purpose of this requirement is to limit the scope of appeals by encouraging persons to be involved in the public hearing. Only in extraordinary circumstances should new issues be considered by the hearings body on an appeal.*

**Staff Discussion:** The applicant has submitted additional information which pertains only to the removal of one lot, a reduction in the intensity of the proposed development. Staff consider this information essential to resolve this appeal in an expedient matter. The appellant's statement and accompanying diagrams are included as **(Attachment B)**. Staff do not consider this a new issue; rather, one that is directly center to the initial denial of the application and the subsequent appeal. Specifically, concerns related to setbacks, parking and general compatibility.

**Staff Discussion of Appeal Application**

Staff concur with the appellant's assertion that the Planning Commission incorrectly applied or misinterpreted the appropriate review standards for a subdivision approval. Staff find the subdivision request meets and will meet as conditioned, the appropriate standards found in Canby Municipal Code 16.62 and 16.64. The denial of a subdivision application based on its character or the surrounding vicinity is not an approval criteria and cannot be used as justification for denying a subdivision.

The applicant's statement regarding the due process portions of whether the hearing should have been held open for additional evidence, continuances and similar points are not considered here by staff. Staff do not have authority to override the Planning Commission's procedural decision making process.

At its simplest terms, the applicant/appellant is requesting consideration of the Hemmerling Project which contains the Type IV Comprehensive Plan Map amendment and zone change and the Type III appeal of

the subdivision denial. Judicial efficiency would dictate that a decision at this level will cure any timeline issues related to ORS 227.178 and other procedural considerations.

The applicant/appellant does not delve into detailed code considerations – nor did the Planning Commission cite specific code reasoning for why the subdivision should be denied.

### **Staff Recommendation**

Should the Mayor and City Council agree to consider the limited additional information provided by the applicant, Staff believe the information is sufficient to address Planning Commission's final findings of denial. Permitting new information will allow the city council to find, that the Commission did not adequately consider all of the information which was pertinent to the case and that the Commission did not correctly interpret the Canby Municipal Code. Regardless, of a motion to approve or deny, the application needs a final determination at this hearing so that the 120-day timelines are appropriately considered.

Staff do not recommend remanding this decision back to Planning Commission because additional information and sufficient clarification has been provided for City Council to determine whether the original findings have been addressed.

Therefore, staff recommend Council overturn the Planning Commission's decision and make a motion to approve with original conditions, Hemmerling – SUB 21-02.

### **Council Action**

There are two possible actions that the City Council may take in regards to the appeal of the Planning Commission's decision. These are:

1. Uphold the Planning Commission's denial of the request and affirm the Planning Commission's final written findings.
2. Overturn the Planning Commission's denial of the request based on one or more of the findings listed above (see a–c under "Appeal Review Criteria").

Sample language: *"I move to approve Option \_\_\_ as indicated in the Council Staff Memorandum dated May 21, 2021."*

### **Attachments:**

- A. Applicant / Appellant Appeal Application and Materials
- B. Alternative Preliminary Subdivision Plan and Associated Exhibit (received after Planning Commission decision.)
- C. Planning Commission Minutes for May 10, 2021 Hearing
- D. Planning Commission Findings, Conclusion & Final Order for Applications CPA/ZC 21-01, SUB 21-02 and VAR 21-02
- E. Planning Commission Packet from May 10, 2021 Hearing